LIBRARY

Office-Supreme Court, U.S.
FILED
JAN 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 581

LARRY THEODORE FRENCH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

MORRIS LAVINE
215 West Seventh Street
Los Angeles, California 90014
MAdison 7-3241

Attorney for Appellant

Jeffries Banknote Company, Los Angeles — MA 7-9514

TABLE OF AUTHORITIES CITED

Cases	Page
Bantam Books v. Sullivan, 372 US 58, 9 L.ed.2d 584	10
Lanzetta v. New Jersey, 306 US 451, 83 L.ed. 888	3, 7, 8
Mishkin v. New York, 16 L.ed.2d 56	10, 11
Robinson v. California, 370 US 660, 8 L.ed.2d 758	11
Screws v. United States, 325 US 91, 89 L.ed. 1495	4
Winters v. New York, 333 US 507, 92 L.ed. 804	8, 9

STATUTES

Constitution of the United States Fourteenth Amendment	1, 2
Penal Code of California Section 7(1)	7
Section 290	2
Section 314.1	1
United States Code Title 28, Section 1257(2)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 581

LARRY THEODORE FRENCH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

Larry Theodore French, a defense plant worker with substantial rights of reputation which would disappear if the judgment in this case is finally sustained, respectfully moves this Court to re-examine this appeal and to grant a rehearing thereon on the basis that, contrary to the order of dismissal, this case does present a substantial federal question of due process which heretofore has on many occasions resulted in hearings granted and decisions by this Court reversing the judgments.

This is an appeal from California Penal Code Section 314.1 which has been attacked as unconstitutional under the Fourteenth Amendment, U.S. Constitution, inherently and as construed and applied in this case as being too vague and indefinite to constitute a criminal statute.

This ground has always been considered substantial where supported by the record. We respectfully submit that the record supports this ground where the words used in the statute contain no definition or limitation and are not subject to common definition or explanation.

The words involved here as being too vague and uncertain and not defined by the California statute are the words "willfully", "lewdly" and "private parts".

We assign the following grounds for rehearing:

1. The Court erred in holding that the questions presented did not present substantial questions.

The words involved in this case are words used very widely in cases involving obscenity, misconduct of men and women involving exposure of the male sexual organs, the female sexual organs or rectum, the breasts and "topless" performances and others, and as to whether the words in this case, undefined and unlimited, are so vague, indefinite and uncertain as to violate the due process clause of the Fourteenth Amendment.

In California, violation of the section involved requires registration and subjects the alleged offender to the registration and reporting statute as a sexual offender. Section 290, Penal Code of California.

This Court, in holding that the question is not substantial, has therefore overlooked its numerous decisions as to vagueness and indefiniteness of statutes as making the statutes unconstitutional in violation of the due process clause of the Fourteenth Amendment.

Thus, in the case of *Lanzetta v. New Jersey,* 306 US 451, 83 L.ed. 888, the Court held that the single word "gangster" was too vague and uncertain to constitute a penal statute.

The Court, in *Lanzetta v. New Jersey*, said:

> "The phrase 'consisting of two or more persons' is all that purports to define 'gang.' The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied."

The meanings of the words "private parts" are numerous and varied. In some cases they refer to the female sex organs or the rectum, or they may refer to the top portion of the body, such as the breasts, which recently have been the subject of considerable legal contention in shows where the actresses or waitresses are "topless". In the case of males, "private parts" could mean either the organs of procreation or the rectum. But the statute does not define them.

The word "lewdly" is not defined in the California statute and the statute contains no definition of just what is "lewd" and whether it consists of an exposure coupled with a manifestation of a sexual nature or whether it is something else. It is not explained in any definition.

Nor is the word "willfully", as contained in this particular statute, defined. "Willfully" has many meanings in different situations and requires definition, which the Court has apparently overlooked.

Screws v. United States, 325 US 91, 89 L.ed. 1495 In the *Screws* case, this Court said:

> "The requirement for a 'willful' violation was introduced by the draftsmen of the Criminal Code of 1909. Act of March 4, 1909, 35 Stat 1088, 1092, c 321, 18 USCA § 52, 7 FCA title 18, § 52. And we are told 'willfully' was added to § 20 in order to make the section 'less severe.' 43 Cong Rec 60th Cong 2d Sess p 3599."

The federal government, in an opinion by Mr. Justice Douglas in *Screws v. United States,* 325 US 101, has defined willfulness as it applies to a criminal statute, as follows:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 US 492, 497, 87 L ed 418, 422, 63 S Ct 364. At times, as the Court held in United States v. Murdock, 290 US 389, 394, 78 L ed 381, 384, 54 S Ct 223, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois C. R. Co. 303 US 239, 82 L ed 773, 58 S Ct 533. But 'when used in a criminal statute it generally means an act done with a bad purpose.' Id, 290 US p 394, 78 L ed 384, 54 S Ct 223. And see Felton v. United States, 96 US 699, 24 L ed 875; Potter v. United States, 155 US 438, 39 L ed 214, 15 S Ct 144; Spurr v. United States, 174 US 728, 43 L ed 1150, 19 S Ct 812; Hargrove v. United States (CCA 5th) 67 F(2d) 820, 90 ALR

1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 US 250, 66 L ed 604, 42 S Ct 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra (174 US p 734, 43 L ed 1152, 19 S Ct 812); United States v. Murdock, supra (290 US p 395, 78 L ed 385, 54 S Ct 223). And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 US 513, 524, 86 L ed 383, 390, 62 S Ct 374.

An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. Those cases, however, make clear that if we construe 'willfully' in § 20 as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See United States v. L. Cohen Grocery Co, 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045, supra. But where the punishment imposed is only for an

act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. That was pointed out by Mr. Justice Brandeis speaking for the Court in Omaechevarria v. Idaho, 246 US 343, 62 L ed 763, 38 S Ct 323. An Idaho statute made it a misdemeanor to graze sheep 'upon any range usually occupied by any cattle grower.' The argument was that the statute was void for indefiniteness because it failed to provide for the ascertainment of boundaries of a 'range' or for determining what length of time was necessary to make a prior occupation a 'usual' one. The Court ruled that 'any danger to sheepmen which might otherwise arise from indefiniteness, is removed by § 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."' Id 246 US p 348, 62 L ed 768, 38 S Ct 323. A similar ruling was made in Hygrade Provision Co. v. Sherman, 266 US 497, 69 L ed 402, 45 S Ct 141. The charge was that a criminal statute which regulated the sale of 'kosher' meat or products 'sanctioned by the ortho-

dox Hebrew religious requirements' was unconstitutional for want of any ascertainable standard of guilt. The Court speaking through Mr. Justice Sutherland stated, '. . . since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement.' 266 US pp 502, 503. In United States v. Ragen, 314 US 513, 86 L ed 383, 62 S Ct 374, supra, we took that course in a prosecution for willful evasion of a federal income tax where it was alleged that the defendant had deducted more than 'reasonable' allowances for salaries. By construing the statute to require proof of bad faith we avoided the serious question which the rule of United States v. L. Cohen Grocery Co. 255 US 81, 65 L ed 516, 41 S Ct 298, 14 ALR 1045, supra, might have presented. We think a like course is appropriate here."

California's definition of the word "willful" is more vague and less certain. In Penal Code, Section 7(1), it states:

"1. The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another or to acquire any advantage;"

In *Lanzetta v. New Jersey*, 306 US 451, 83 L.ed. 888, this Court said:

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532, 73 A.L.R. 1484; Lovell v. Griffin, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

As stated in the *Lanzetta* case, the descriptions and illustrations to indicate the meaning of "willfully", "lewdly" and "private parts" are not sufficient to constitute definition, inclusive or exclusive.

See also: *Winters v. New York*, 333 US 507, 92 L.ed. 804.

The *Winters* case involved the possession of a publication involving printing or selling or giving away books, pamphlets, etc., that have stories among other things of "lust or crime". The validity of the New York statute was attacked on the ground of vagueness and indefiniteness and this Court held that the question was substantial. It held that "The crime 'must be defined with appropriate definiteness'. Cantwell v. Connecticut, 310 US 396, 84 L.ed. 1213, Pierce v. U.S., 314 US 306, 311, 86 L.ed. 226. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, Lanzetta v. New Jersey, 306 US 451, or in regard to the applicable tests to ascertain guilt."

The Court held the statute unconstitutional.

In the dissenting opinion of *Winters v. New York*, it is stated:

> "Only a word needs to be said regarding Lanzetta v. New Jersey, 306 US 451, 83 L ed 888, 59 S Ct 618. The case involved a New Jersey statute of the type that seeks to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col L Rev 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes,' and laws against 'gangs'

are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided."

In *Mishkin v. New York*, 16 L.ed.2d 56, the Court considered whether the word "obscene", as used in a State criminal obscenity statute, is vague and upheld the statute. We submit that the word "lewd" is vague. The Court in the *Mishkin* case refers to the "ambiguities inherent in the definition of obscenity". We point to the inherent ambiguities in the definition of "lewdness", "private parts" and "willfully".

Bantam Books v. Sullivan,
372 US 58, 9 L.ed.2d 584

It is respectfully submitted that the California statute avoids definiteness so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution.

We think the statute involved in this case contains substantial violations of constitutional rights of due process, is too vague and indefinite to constitute penal legislation and enables police to form a dragnet.

We pray for rehearing and reversal of the judgment below.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellant

CERTIFICATE OF COUNSEL

This petition for rehearing is filed in good faith and not for the purposes of delay and is based upon the Court's order dismissing the appeal on the ground that it presents no substantial federal question, a ground occurring since the filing of the appeal and this court's decision thereon. We submit that the grounds presented by this appeal present a substantial federal question and entitle the appellant to a hearing as a matter of right.

Title 28, Section 1257(2), U.S. Codes
Robinson v. California, 370 US 660, 8 L.ed.2d 758
Mishkin v. New York, 16 L.ed.2d 56

MORRIS LAVINE
Attorney for Appellant